

1992

# Susan Anne Wells v. David John Wells : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SUSAN ANNE WELLS	:	BRIEF OF APPELLANT
Plaintiff/Appellant,	:	
vs.	:	Case No. 920230-CA
DAVID JOHN WELLS,	:	Priority No. 16
Defendant/Appellee.	:	

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BRIEF OF APPELLANT

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APPEAL FROM A DECISION RENDERED BY  
THE HONORABLE DAVID S. YOUNG,  
JUDGE OF THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH,  
DISMISSING PLAINTIFF'S PETITION TO MODIFY DIVORCE DECREE,  
FOLLOWING A TRIAL HELD ON FEBRUARY 11, 1992.

---

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FILED

IN THE UTAH COURT OF APPEALS

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SUSAN ANNE WELLS	:	BRIEF OF APPELLANT
Plaintiff/Appellant,	:	
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### STATEMENT OF JURISDICTION

Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to Section 78-2(a)-3(2)(i) of the Utah Code (1953, as amended).

### STATEMENT OF THE ISSUES

A. Did the trial court abuse its discretion in denying Susan's Petition for modification of alimony, both on a temporary basis and permanently, when the evidence established the following:

1. Susan had sustained a substantial decrease in income due to a loss of employment.

2. Susan showed a great need for alimony because her expenses greatly exceeded her unemployment income.

3. David had the ability to pay additional alimony because of his substantial income.

4. David was responsible, in part, for Susan's unstable employment situation because of his refusal to assist Susan in caring for the minor children and his constant harassment.

5. During the course of the marriage, Susan had stayed home with the children and did not have the opportunity to develop a career, as did David.

#### Standard of Appellate Review:

Abuse of Discretion

#### Authority:

Utah Code Ann. 30-3-3

Utah Code Ann. 30-3-5(3)

Paffel v. Paffel, 732 P.2d 96 (Utah 1986)

Whitehouse v. Whitehouse, 790 P.2d 121  
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Harding v. Harding, 488 P.2d 308 (Ut. 1971)

Curran v. Curran, 786 P.2d 205  
(Or. App. 1990)

Yelderman v. Yelderman, 669 P.2d 406  
(Utah 1983)

Beckstead v. Beckstead, 663 P.2d 47 (Ut. 1983)

Newmeyer v. Newmeyer, 745 P.2d 1276 (UT. 1987)

B. Did the items set forth above in paragraph A(1-5) constitute a substantial and material change in circumstances sufficient to warrant a modification of the parties' Divorce Decree respecting alimony?

Standard of Appellate Review:

Abuse of Discretion

Authority:

Utah Code Ann. 30-3-3

Utah Code Ann. 30-3-5(3)

Paffel v. Paffel, 732 P.2d 96 (Utah 1986)

Whitehouse v. Whitehouse, 790 P.2d 121  
(Utah 1990)

Throckmorton v. Throckmorton, 767 P.2d 12  
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Harding v. Harding, 488 P.2d 308 (Ut. 1971)

Curran v. Curran, 786 P.2d 205  
(Or. App. 1990)

Yelderman v. Yelderman, 669 P.2d 406  
(Utah 1983)

Beckstead v. Beckstead, 663 P.2d 47 (Ut. 1983)

Newmeyer v. Newmeyer, 745 P.2d 1276 (UT. 1987)

C. Did the Court err in denying Susan's Motion for Temporary Alimony, pursuant to Rule 6-404 of the Code of Judicial Administration, when Susan was able to show her definite need as a result of her loss of employment and when David had the financial ability to pay the same?

Standard of Appellate Review:

Abuse of Discretion

Authority:

Utah Code Ann. 30-3-3

Rule 6-404, Utah Code of Judicial  
Administration

Paffel v. Paffel, 732 P.2d 96 (Utah 1986)

Parish v. Parish, 84 Ut. 390, 35 P.2d 999  
(1934)

Scott v. Scott, 105 Ut. 376, 142 P 2d 198  
(1943)

Anderson v. Anderson, 13 Ut.2d 36,  
368 P.2d 264 (1962)

Vignes v. Vignes, 311 So.2d 615 (La. App.)

D. Was Susan entitled to obtain a temporary increase in alimony pending a final hearing on her Petition for Modification of the Divorce Decree?



Standard of Review:

Abuse of Discretion

Authority:

Utah Code Ann. 30-3-3

Rule 6-404, Utah Code of Judicial  
Administration

Paffel v. Paffel, 732 P.2d 96 (Utah 1986)

Parish v. Parish, 84 Ut. 390, 35 P.2d 999  
(1934)

Scott v. Scott, 105 Ut. 376, 142 P.2d 198  
(1943)

Anderson v. Anderson, 13 Ut.2d 36,  
368 P.2d 244 (1962)

Vignes v. Vignes, 311 So.2d 615 (La. App.)

E. Did the Court err in refusing to award Susan her  
attorney fees?

Standard of Review:

Abuse of Discretion

Authority:

Whitehead v. Whitehead, 193 Utah Adv. Rep. 8  
(Aug. 7, 1992)

## **STATUTES AND RULES**

1. Section 30-3-3, Utah Code Ann.

### **Temporary alimony and suit money.**

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute and defend the action.

2. Section 30-3-5(3), Utah Code Ann.

See addendum

3. Rule 6-404, Utah Rules of Judicial Administration.

See addendum

## **STATEMENT OF THE CASE**

### **A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION**

This appeal is from a final order rendered by the Honorable David S. Young on March 3, 1992 in the Third Judicial District Court in and for Salt Lake County, State of Utah which denied Susan's Petition to Modify Decree of Divorce and an associated Motion for Temporary Relief.

The parties to this action were divorced by a decree entered by the lower court on November 30, 1992. As a part of the decree, Susan was awarded alimony in the amount of \$1.00 per year. On August 26, 1991, Susan filed a petition to modify the parties divorce decree to increase her alimony award because she had lost her job three months earlier. In order to obtain financial assistance pending a resolution of her petition, Susan also filed a Motion for temporary child support and alimony. A hearing on Susan's Motion was heard before Commissioner Michael Evans on September 10, 1991 and the motion was denied. Commissioner Evans ruled that Susan's request for temporary alimony "constitutes a modification of the original decree of divorce in violation of Rule 6-404, Rules of Judicial Administration, and cannot be dealt with on the law and motion calendar". Susan filed an objection to the Commissioner's recommendation on September 20, 1991 and the objection was reviewed by Judge David S. Young. Judge Young, in a ruling entered on October 23, 1991, denied Susan's objections and upheld the Commissioner's refusal to award temporary alimony.

On January 6, 1992, a Pre-trial Conference was held before Commissioner Sandra Peuler and the case was certified for trial. Trial was held before the Honorable David S. Young on February 11, 1992 at 2:00 p.m.. After hearing the evidence, Judge Young ruled that although Susan had shown a substantial change in circumstances because of her loss of job, both parties were able to earn sufficient amounts of income to meet their needs and obligations. Judge Young subsequently dismissed the Plaintiff's Petition on David's motion.

#### **B. STATEMENT OF FACTS**

1. The parties to this action were married on October 29, 1966. At the time of the parties' marriage, Susan was 20 years old and had not yet finished her college education. Subsequently, three children were born to the parties and one child was adopted. Susan provided the majority of the day to day care for the children. (Transcript p. 10, 11, 33; Record p. 380).

2. 1. The parties to this action were divorced on November 30, 1982, after 16 years of marriage. (Record p. 132 - 135).

3. Pursuant to the parties' Divorce Decree, Susan was awarded, among other things, custody of the parties' three minor children, together with alimony in the amount of \$1 per year. (Record p. 132 - 135).

4. At the time of the divorce, Susan was employed and earning approximately \$12,000.00 per year. David was employed by

Unisys and was earning between \$42-43 Thousand Dollars per year. (Transcript p. 15).

5. After the divorce, Susan did her best to develop a career so that she could adequately care for herself and the children. In doing so, Susan was employed by several different firms but had trouble maintaining employment because of her lack of seniority. She also had a difficult time maintaining stable employment because her employment frequently required her to travel out of town. This was very difficult while trying to raise three children and was aggravated by the fact that Mr. Wells would not assist Susan in caring for the children during such periods. A brief summary of Susan's employment since the divorce is set forth as follows:

A. At the time of the divorce, Susan was employed by Beckton Dickenson Company in Salt Lake City. Susan was laid off in 1984 after Beckton Dickenson closed its Salt Lake division. (Transcript p. 15, 16).

B. Susan was thereafter hired by Wicat Systems and was laid off in November of 1984 due to a one-third reduction in work force. (Transcript p. 17).

C. Susan was thereafter hired by Hercules until December of 1986. Her employment was terminated because of a mass employee layoff and her low seniority. (Transcript p. 17).

D. From 1987 through June of 1989, Susan worked for Morton Thiokol. During this time, Susan's job required that she travel out of state on an average of twice per month for 3-5 days

each trip. While Susan was away on one such trip, the parties son was involved in a car accident. Rather than helping Susan during this stressful time, David filed charges with the Department of Social Services alleging that Susan was an unfit mother. In addition, David was very rude to Shannon Ledezma who was caring for the children. Even though his charges were dismissed by Social Services, David's actions created enormous stress for Susan. At the time of trial, Judge Young commented that David's actions of engaging the Department of Social Services "was completely irresponsible and should not have occurred....and I think your approach to Ms. Ledezma was irresponsible and inappropriate". Because of David's harassment and the stress resulting from her travel, Susan left Thiokol in June of 1989. (Transcript p. 18 - 23; 45 - 49, 63 - 64).

E. After Thiokol, Susan obtained employment with Futura Company on September 10, 1990. Susan left Futura because of sexual harassment from her boss. On January 21, 1991, Susan joined EDO Corporation. Due to government cut backs and financial problems, Susan was laid off on May 24, 1991. (Transcript p. 24 - 25).

4. At the time of her layoff from EDO Corporation, Susan was earning a gross monthly income of \$3083. After her termination, Susan received an income of approximately \$212 per week from unemployment benefits. During the period of her unemployment, Susan incurred substantial debts and obligations, including a mortgage arrearage of \$6176.00. Her car was also

repossessed leaving a deficiency of \$3,600.00. (Transcript 25 - 30, 37, 34, 35; Record p. 383, 384; Exhibit 2-P)

5. At the time of trial, David had a gross income of \$67,200.00 per year. (Transcript p. 56)

6. On or about August 22, 1991, after three months of unemployment, Susan filed a Petition for Modification of the Divorce Decree and requested that David's obligation to pay alimony be increased to assist her in meeting her monthly expenses. Susan also requested that the Court grant an amount of temporary alimony pending a final hearing on her Petition. The Court denied her request for temporary alimony. The Court ruled that the temporary relief sought "constitutes a modification of the original decree of divorce in violation of 6-404, Rules of Judicial Administration, and cannot be dealt with on the Law and Motion calendar". (Record p. 304 - 314, 315 - 322, 327)

7. On January 20, 1992, Susan was hired by WINCO - (Westinghouse Idaho Nuclear Company), after being unemployed for approximately eight months, at a salary of \$3000.00 per month. Her employer is located in Idaho Falls, Idaho. Because of the distance from her home, Susan was forced to rent a small home in Idaho for \$560.00 per month, in addition to maintaining her Utah home. (Transcript p. 8,9, 29, 30; Exhibit P-1).

## SUMMARY OF ARGUMENTS

The lower court's dismissal of Susan's Petition for modification and related orders was in error for the following reasons:

1. Susan was entitled to temporary relief. Rule 6-404 of the Rules of Judicial Administration does not prevent an award of temporary alimony pending the prosecution of a Petition to Modify. Rather, the Court has broad equitable powers to make such an award pursuant to Sections 30-3-3 and 30-3-5(3) of the Utah Code.

2. The Trial Court Improperly Denied Susan's Petition. The trial court improperly denied Susan's Petition for the following reasons:

A. The award of \$1.00 per year alimony in the original divorce decree was designed to assist Susan in difficult times, such as the loss of a job.

B. Susan was entitled to an award of alimony because she had serious financial needs, had the inability to produce sufficient income to pay her bills, and because David had sufficient resources to pay the same.

C. Susan's loss of a job provided a change of circumstances sufficient to support a modification of the divorce decree.

D. The fact that Susan became employed one month prior to trial should not preclude a modification of alimony.



3. Attorney Fees: At the time of trial, Susan showed that she had a definite need for her attorney fees to be paid, that David had adequate means to pay the same, and that the fees incurred were reasonable.

### ARGUMENT

This case presents two major questions which beg a resolution by the Court. First, can the court grant a party who is seeking a modification of a divorce decree temporary relief while the petition is being prosecuted? If temporary relief cannot be granted, a reduction of income due to a job loss places the obligee spouse in a very untenable position - that of waiting for a final decision on the Petition before obtaining the necessary relief. Until such time, the Obligee spouse must go without, all during the time relief is critically needed. In the instant case, Susan Wells was required to wait for over 8 months, even though she had desperate needs.

Second, when can a \$1.00 per year alimony award be modified, and is unemployment for an extended period sufficient cause?

For the following reasons, the trial Court abused its discretion by denying Susan temporary relief when it was critically needed and for ignoring her financial needs resulting from a job loss.

**A. SUSAN WAS ENTITLED TO AN AWARD OF TEMPORARY ALIMONY.**

The Court, in denying Susan an award of temporary alimony, ruled that her request "constitutes a modification of the original decree of divorce in violation of 6-404, Rules of Judicial Administration, and cannot be dealt with on the law and motion calendar". The Court's ruling was in error, and should be reversed for the following reasons:

First, the provisions of the Utah Code provide the Court with substantial equitable powers to provide for the support and maintenance of parties in divorce matters, both before granting the divorce and after. Section 30-3-5(3) of the Code provides that "the Court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties... as is reasonable and necessary" (emphasis added).

In addition, Section 30-3-3 of the Utah Code authorizes the Court to make awards of temporary alimony. Section 30-3-3 provides: "The Court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action". Although the statute doesn't expressly state

that the "temporary order" provisions of Section 30-3-3 apply to petitions for modification, the Utah Supreme Court has interpreted the statute as applying to both original cases and petitions to modify. Anderson v. Anderson, 368 P.2d 264 (Utah 1962); Maughn v. Maughn, 770 P.2d 156 (Utah 1989).

Second, Susan's motion for temporary relief was not prohibited by Rule 6-404 of the Rules of Judicial Administration. Rule 6-404 provides, in pertinent part:

...(1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.

Susan's Motion for Temporary Alimony is not a request to modify the Divorce Decree prior to a hearing on the Plaintiff's Petition. Rather, Susan simply filed her motion pursuant to §30-3-3 of the Utah Code and requested that the court use its equitable powers and award her temporary alimony so that she could adequately prosecute her case and maintain her obligations.

In the instant case, Susan's Motion for Temporary Alimony was properly before the Court and should have been granted. As set forth in the Statement of Facts, Susan's income had been lowered substantially because she had lost her job. At the time of filing her motion, she had been unemployed for three months and did not have any prospects for employment in the foreseeable future. Furthermore, Susan showed that she was in danger of losing her home

and that David had sufficient income to provide assistance. Because of her great needs and David's ability to pay, the Court abused its discretion in not awarding temporary support.

**B. THE TRIAL COURT ERRED IN DISMISSING SUSAN'S PETITION**

Susan's appeal in this case concerns the practical application of the often used clause in divorce cases which reserves alimony to a spouse in the amount of \$1.00 per year. Such a clause is generally utilized to give the receiving spouse the opportunity to seek a modification of the award if a need arises in the future. Newmeyer v. Newmeyer, 745 P.2d 1276 (Ut. 1987). At the time of the divorce, such an award was certainly warranted in Susan's favor because of the following:

1. The parties had been married for 16 years.
2. At the time of their marriage, Susan was only twenty years old and had not finished her education.
3. Three children were born to the parties during the marriage and another adopted, and Susan had been the primary caretaker. Because she stayed home with the children, David was able to develop his career and was in a financially superior position at the time of the divorce.

In order to obtain a modification of her alimony award, Susan must first show that there has been a substantial change in circumstances since the entry of divorce. This requirement, as found by Judge Young, was established by Susan's loss of employment. In ruling on this case, Judge Young stated that "... I think the Court would be obligated to find that there has been a

change of circumstance just simply by the fact of unemployment and then re-employment and those kinds of events occurring in Ms. Wells life,..." (Transcript p. 60). Judge Young's finding of a "change in circumstances" is supported by substantial authority that a loss of employment can provide the basis for a modification.

In Throckmorton v. Throckmorton, 767 P.2d 121 (Ut. App. 1988), the Utah Appellate Court increased an alimony award from \$1 per year to \$396 per month in favor of Mrs. Throckmorton because she was no longer receiving child support payments for the children and was unemployed due to a serious medical condition. The Court affirmed the trial Court's finding of a substantial change of circumstances justifying a modification of the alimony provision based upon the above factors.

In the case of Ridge v. Ridge, 542 P.2d 191 (Ut. 1975), the Utah Supreme Court affirmed the trial Court's modification of an alimony award based upon the husband's reduction of income from \$3200 per year to \$2300. A similar ruling was upheld in Harding v. Harding, 488 P.2d 308 (Ut. 1971), in which an alimony award was reduced because of a reduction of income sustained by the husband due to a transfer of employment.

The case law in the State of Oregon is similar. In the case of Curran v. Curran, 786 P.2d 205 (Or. App. 1990), the Court found that the ex-husband's loss of a teaching position constituted a substantial change in circumstances warranting a reduction in alimony from \$400 per month to \$50 per month.

Having found a substantial change in circumstances, the Court must then determine whether an increase in alimony is warranted. This is done by analyzing the following factors: (1) The financial condition and needs of the spouse; (2) The ability of the spouse to produce sufficient income for herself; and (3) the ability of the paying spouse to provide support. Jones v. Jones, 700 P. 2d 1072, 1079 (Utah 1985); Paffel v. Paffel, 732 P.2d 96 (Utah 1986).

In the instant case, the three prong test has been satisfied in Susan's favor. First, Susan has shown a definite need for assistance. During the eight months that she was unemployed, Susan incurred an arrearage of over \$6,000.00 on her home, had her car repossessed and incurred a deficiency of \$3,600.00, and fell behind in other obligations. Second, Susan did her best to obtain sufficient income for her needs. There is no evidence that she was voluntarily unemployed or that she had any employment options. Her only source of income consisted of unemployment compensation and child support. Finally, David was well positioned to pay Susan alimony. At the time of trial, David's gross annual income was \$67,200.00. Because Susan had met all of the requirements of the three prong test, the Court improperly denied her an increase of alimony.

Even though Susan was entitled to an increase of alimony pursuant to the three prong test, the Court, in its ruling, inferred that Susan's subsequent employment in January of 1992 made her ineligible for a modification of the decree. There is no

authority to support this conclusion and equity dictates otherwise. The fact that Susan had been re-employed after 8 months of unemployment did not mean that she was without financial need. The evidence at trial showed that Susan had substantial obligations and arrears because of her extended unemployment. The mere fact that Susan had obtained a job did not instantly change her financial position. Furthermore, the Court could have increased her alimony only during the time that Susan was unemployed. Such a modification did not have to extend indefinitely. Such an order would be equitable in this case because of the unequal earning capacities of the parties.

In addition, the denial of Susan's petition because of re-employment would penalize her for attempting to improve her situation. As a practical matter, a petition for modification generally takes several months to come to trial. Although Susan's employment is certainly a factor to consider when determining the extent of her financial condition, it should not be a reason to deny her petition outright without examining the financial status of the parties. As set forth above, Susan had acquired a large amount of debt during her unemployment and her financial condition remained in a poor state because of accumulated debt.

Finally, if the dismissal of Susan's Petition is upheld, the "\$1.00 per year" alimony clause in Susan's decree will be rendered meaningless. Even though the divorce was granted several years ago, Susan has never been able to catch up with David in terms of income and job stability. Her sacrifices for David and

the children during the marriage and thereafter have put her at a distinct financial disadvantage. The alimony clause was designed to assist Susan through the same type of problems that caused her to file her petition for modification. To do otherwise makes a mockery of the decree and is not equitable.

#### **C. SUSAN SHOULD BE AWARDED HER ATTORNEY FEES**

The decision as to whether to award attorney fees is in the sole discretion of the Court. Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991). In making such an award, the Court must consider the "financial needs of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." Whitehead v. Whitehead, 193 Utah Adv. Rep. 8 (Aug. 7, 1992).

In the instant case, the court abused its discretion by failing to take into account Susan's disadvantaged financial condition and David's ability to pay. Furthermore, there was no objection to the amount requested. For these reasons, Susan's request for an award of attorney fees was improperly denied and should be reversed.


#### **CONCLUSION**

In her petition, subsequent memoranda, and the evidence adduced at trial, Susan has established the following: First, she has shown a substantial change in circumstances respecting her employment and income since the entry of the Decree of Divorce. Second, she has shown a great and immediate financial need for assistance from David. Finally, she has shown that David had



sufficient assets and financial means to assist her. Because of the above, the court should reverse the trial courts dismissal of her Petition and request for temporary relief and remand for the entry of an award of alimony and attorney fees commensurate with her needs.

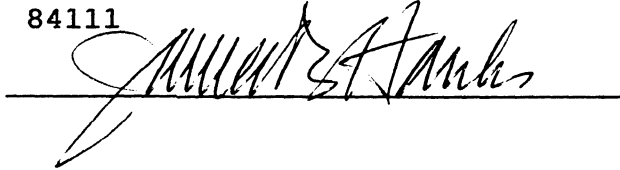
DATED this 16 day of December, 1992.

  
\_\_\_\_\_  
JAMES B. HANKS  
Attorney for Susan Wells

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed, postage prepaid on the 16 day of December, 1992, to the following:

PETER W. GUYON  
Attorney for Defendant/Appellee  
433 South 400 East  
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Michael A. Hanks", is written over a horizontal line.

## **ADDENDUM**

- A. Commissioner's Recommendation Denying Motion for Temporary Alimony.
- B. Order Affirming Commissioner's Recommendation.
- C. Order Denying Temporary Alimony.
- D. Order Denying Petition to Modify Decree of Divorce.
- E. Transcript of Judge Young's Findings.
- F. U.C.A. 30-3-5(3).
- G. Rule 6-404, Utah Rules of Judicial Administration.

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

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WELLS, SUSAN ANNE	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 814902737 DA
	:	DATE 09/10/91
VS	:	HONORABLE MICHAEL S. EVANS
	:	COURT REPORTER TAPE-1-7:37-15:19
WELLS, DAVID JOHN	:	COURT CLERK CPW
DEFENDANT	:	

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TYPE OF HEARING: MOTION HEARING  
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. HANKS, JAMES B.  
D. ATTY. GUYON, PETER W.

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COMMISSIONER RECOMMENDS:

1. REGARDING ALIMONY: SUBSTANTIAL PERIOD OF TIME HAS PASSED & PARTIES HAVE SUPPORTED THEMSELVES. REQUEST FOR TEMP. ALIMONY DENIED PURSUANT TO 6-404. PLTF ASKING COURT TO MAKE A DETERMINATION THAT SUBSTANTIAL CHANGE OF CIRCUMSTANCES HAS OCCURRED. COURT MUST MAKE DETERMINATION THAT CHANGE HAS OCCURRED & CANNOT DO SO ON LAW & MOTION CALENDAR.  
MR. GUYON PREPARE ORDER.

*Michael S. Evans*

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

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WELLS, SUSAN ANNE	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 814902737 DA
	:	DATE 10/23/91
VS	:	HONORABLE DAVID S. YOUNG
	:	COURT REPORTER
WELLS, DAVID JOHN	:	COURT CLERK NP
DEFENDANT	:	

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TYPE OF HEARING:  
PRESENT:

P. ATTY. HANKS, JAMES B.  
D. ATTY. GUYON, PETER W.

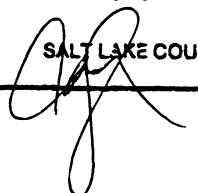
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PLAINTIFF'S OBJECTIONS TO THE COMMISSIONER'S RECOMMENDATION  
AND REQUEST FOR ORAL ARGUMENT ARE EACH DENIED. MR. GUYON IS  
TO PREPARE AN ORDER CONSISTENT HERewith.  
C.C. TO COUNSEL

W189A ✓

FILED DISTRICT 02  
Third Judicial Dist

NOV 08 1991

By  SALT LAKE COUNTY  
Clk

Peter W. Guyon (1285)  
Attorney for Defendant  
433 South 400 East  
Salt Lake City, Utah 84111  
Telephone: (801) 322-5555

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

SUSAN ANNE WELLS,	:	ORDER ON PLAINTIFF'S
	:	VERIFIED MOTION FOR
Plaintiff,	:	TEMPORARY CHILD SUPPORT
	:	AND ALIMONY
v.	:	
DAVID JOHN WELLS,	:	Civil No. D-81-2737
	:	Judge: David S. Young
Defendant.	:	

---oooOooo---

On the 10th day of September, 1991, PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY CHILD SUPPORT AND ALIMONY was heard before Commissioner Michael S. Evans, and came Plaintiff in person and by and through counsel James B. Hanks and came Defendant in person and by and through counsel Peter W. Guyon and the Commissioner, having reviewed the documentation submitted by both parties, having listened to arguments and representations of counsel and being fully advised, and having recommended that Plaintiff's motion be denied as violative of 6-404, Rules of Judicial Administration, and Plaintiff having objected to the Commissioner's recommendation and having requested oral argument

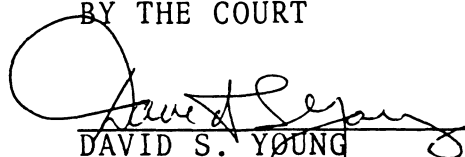
thereon, and both parties having submitted memoranda in support of their respective positions, it is

ORDERED that Plaintiff's objections to the Commissioner's recommendation and request for oral argument are both denied; and it is

FURTHER ORDERED that Plaintiff's VERIFIED MOTION FOR TEMPORARY CHILD SUPPORT AND ALIMONY be, and the same hereby is, denied.

DATED this 8<sup>th</sup> day of NOVEMBER, 1991.

BY THE COURT

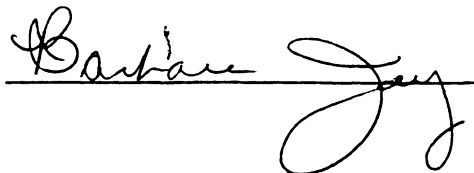
  
\_\_\_\_\_  
DAVID S. YOUNG  
District Judge

#### CERTIFICATE OF MAILING

The undersigned certifies that on the date below a true and correct copy of the foregoing ORDER ON PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY CHILD SUPPORT AND ALIMONY was mailed with all first-class postage prepaid to:

James B. Hanks, Esq.  
Kipp And Christian P.C.  
City Centre I, #330  
175 East 400 South  
Salt Lake City, UT 84111-2314

DATED this 28 day of October, 1991.

  
\_\_\_\_\_

VIIIIBJ

MAR 03 1992

By [Signature] SALT LAKE COUNTY  
Deputy Clerk

JAMES B. HANKS (A4331)  
KIPP AND CHRISTIAN, P.C.  
City Centre I, #330  
175 East 400 South  
Salt Lake City, Utah 84111-2314  
Telephone: (801) 521-3773  
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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SUSAN ANNE WELLS,	:	ORDER DENYING PETITION
	:	TO MODIFY DECREE OF DIVORCE
Plaintiff,	:	
vs.	:	
	:	Civil No. D-81-2737
DAVID JOHN WELLS,	:	
	:	
Defendant.	:	

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On the 11th day of February, 1992, Plaintiff's Petition for Modification of Divorce Decree was heard before the Honorable David S. Young. The Plaintiff's was present and represented by her attorney, James B. Hanks of Kipp and Christian, P.C. The Defendant was present and represented by his attorney, Peter W. Guyon. The Court, having heard the testimony presented by Plaintiff finds that the Plaintiff has not shown a substantial change in circumstances warranting a modification of the parties' divorce decree with respect to alimony. The Plaintiff has the ability to support herself and an increase of the amount of alimony would be improper at this time. Based upon the foregoing, the Court hereby orders as follows:



1. That Plaintiff's Petition for Modification of Divorce Decree be, and hereby is, denied.

2. Pursuant to stipulation of the parties, the following provisions shall bind both the parties insofar as medical and dental expenses for any minor children are concerned:

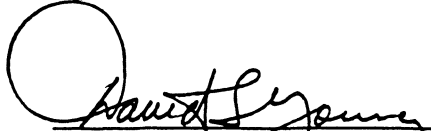
A. The custodial parent shall pay uninsured, routine medical and dental expenses, including routine office visits, physical examinations and immunizations; and

B. Both parents shall share all other reasonable and necessary uninsured medical and dental expenses equally.


3. Both parties shall pay their own attorney fees and costs necessitated by these proceedings.

DATED this 31<sup>st</sup> day of March, 1992.

By the Court:

  
JUDGE DAVID S. YOUNG  
THIRD DISTRICT COURT

Approved as to form:

  
PETER W. GUXON  
Attorney for Defendant

1 IN THE SUMMER OF 1990 SHE WAS EARNING \$40,000.00 A YEAR.  
2 IN MAY OF 1991 SHE LOST HER JOB, SHE DIDN'T HAVE AN INCOME.  
3 SO AGAIN WE HAVE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

4 I THINK SHE'S MORE THAN MET HER BURDEN, YOUR  
5 HONOR, AND I ASK THAT THEIR MOTION BE DENIED.

6 JUDGE YOUNG: DO YOU DESIRE TO FURTHER RESPOND,  
7 MR. GUYON?

8 MR. GUYON: NO, I'LL SUBMIT THAT. WELL, CAN  
9 I TAKE THAT BACK?

10 JUDGE YOUNG: YES, YOU MAY, IF YOU WISH TO SAY  
11 SOMETHING FURTHER.

12 MR. GUYON: JUST ONE THING, JUDGE, AND THAT IS  
13 THAT THE--I THINK IT'S A PART OF THE RECORD, AND THERE WERE  
14 --WELL, I THINK THAT'S INAPPROPRIATE. I SHOULD HAVE CROSS-  
15 EXAMINED ON THAT. I WITHDRAW THAT.

16 JUDGE YOUNG: ALL RIGHT. I HAVE REVIEWED THE  
17 FACTS THAT YOU PRESENT, MR. HANKS, AND THE--I THINK THE  
18 COURT WOULD BE OBLIGATED TO FIND THAT THERE HAS BEEN A CHANGE  
19 OF CIRCUMSTANCE JUST SIMPLY BY THE FACT OF UNEMPLOYMENT  
20 AND THEN RE-EMPLOYMENT AND THOSE KINDS OF EVENTS OCCURRING  
21 IN MS. WELLS' LIFE, BUT AT THE SAME TIME I DO BELIEVE THAT  
22 THERE IS NO ESTABLISHMENT OF SUFFICIENT EVIDENCE TO JUSTIFY  
23 A CHANGE IN REQUIRING ALIMONY BE PAID.

24 IN FACT, IT STRIKES ME THAT UNDER THE CIRCUM-  
25 STANCES OF THIS CASE BOTH OF THESE PARTIES ARE UNIQUELY

1 ABLE TO EARN SUBSTANTIAL AMOUNTS OF MONEY TO MEET THEIR  
2 NEEDS AND OBLIGATIONS. HER EMPLOYMENT HAS BEEN 40,000,  
3 IS NOW 30,000. THERE ARE DECISIONS ASSOCIATED WITH THAT  
4 EMPLOYMENT THAT SHE MUST MAKE AS TO WHETHER SHE IS GOING  
5 TO RESIDE IN UTAH, IN LAYTON, OR WHETHER SHE'S GOING TO  
6 MOVE TO IDAHO FALLS WHERE THE JOB IS, HER FAMILY, HER CIRCUM-  
7 STANCES, HER CHILDREN, JUSTIFY THE MOVE TO IDAHO FALLS.  
8 THE DETERMINATION TO LEAVE THE JOB BECAUSE SHE WAS DISSAT-  
9 ISFIED WITH THE TRAVEL CHALLENGES, THOSE ARE ALL DECISIONS  
10 THAT EVERYBODY HAS TO MAKE IN THE NORMAL COURSE OF THEIR  
11 LIFE.

12 I DON'T SEE THAT THE CIRCUMSTANCES OF THIS CASE  
13 HAVE ESTABLISHED A SUFFICIENT BASIS FOR THE COURT TO CONCLUDE  
14 THAT I OUGHT TO DO ANYTHING WITH THE ALIMONY. AS A MATTER  
15 OF FACT, I HAVE SOME BASIC CONCERNS ABOUT THE PROTECTION  
16 OF THE ONE-YEAR, OR THE \$1.00 PER YEAR PROVISION UNDER THE  
17 CIRCUMSTANCES OF THIS CASE BECAUSE BOTH PARTIES ARE ABLE-  
18 BODIED PERSONS AND ABLE TO EARN INCOME. AND IT SEEMS TO  
19 ME THAT THAT PREFERENCE OF PRESERVING THAT AGAINST THE  
20 PROTECTION THAT THE SAME KIND OF THING MAY HAPPEN TO THE  
21 HUSBAND, HE COULD BECOME SUDDENLY UNEMPLOYED OR LOSE HIS  
22 JOB FOR THE SAME KINDS OF REASONS THAT SHE DID, WOULD YET  
23 DENY HIM ANY PROTECTION WHATSOEVER UNDER THE PRESENT STATUS  
24 OF THE DIVORCE DECREE.

25 SO BASED UPON THE TESTIMONY THAT I'VE HEARD,

1 THE PRESENTATIONS THAT HAVE BEEN PRESENTED HERE, THE COURT  
2 FINDS THAT THE PETITION TO MODIFY SHOULD BE AND THE SAME  
3 IS HEREBY DENIED.

4 I FURTHER FIND THAT EACH PARTY SHOULD BE ORDERED  
5 TO PAY THEIR OWN INDIVIDUAL ATTORNEY'S FEES AND COSTS AS  
6 THEY'VE INCURRED THEM.

7 MR. GUYON, I'LL ASK YOU TO PREPARE THE ORDER.

8 MR. HANKS: JUDGE, ONE MATTER. YOUR HONOR, WE  
9 HAD AGREED THAT THERE WOULD BE A MODIFICATION TO ALLOW BOTH  
10 SIDES TO PAY ONE-HALF OF UNCOVERED MEDICAL BILLS. I BELIEVE  
11 THAT WAS STIPULATED TO, YOUR HONOR.

12 MR. GUYON: THAT'S CORRECT, JUDGE.

13 JUDGE YOUNG: AND THAT SHOULD BE AGREED UPON.

14 MR. GUYON: I WILL PUT THAT IN THE ORDER.

15 JUDGE YOUNG: IS THERE ANYTHING ELSE THAT NEEDS  
16 TO BE--

17 MR. HANKS: YOUR HONOR, MY CLIENT HAS BEEN CON-  
18 CERNED THAT ALL THE FACTS BE HEARD, AND IF THE COURT WOULD  
19 INDULGE ME, SHE HAS BEEN CONCERNED SINCE THE DIVORCE THAT  
20 SHE HAS TRIED TO GET OUT AND EARN AN INCOME BUT THE PROBLEM  
21 SHE'S HAD IS BECAUSE OF HER LACK OF SENIORITY. SHE'S HAD  
22 A HARD TIME GETTING BACK IN THE WORK PLACE. IT SEEMS LIKE  
23 EVERY TIME SHE GETS A FOOT IN THE DOOR THERE'S A REDUCTION  
24 IN THE WORK FORCE AND SHE'S LAID OFF AGAIN. AND I GUESS  
25 OUR CONCERN IS THAT MR. WELLS, ON THE OTHER HAND, DIDN'T

1 HAVE TO STAY HOME WITH THE KIDS, HAD A CHANCE TO DEVELOP  
2 A CAREER AND HE IS IN A TOTALLY DIFFERENT POSITION. HE  
3 IS MUCH MORE ADVANTAGED BECAUSE OF THAT, WHERE SHE MADE  
4 SACRIFICES, STAYED HOME WITH THE KIDS, NOW SHE HAS TO GET  
5 OUT, DEVELOP A CAREER AND IT'S JUST BEEN VERY, VERY DIFFI-  
6 CULT FOR HER, YOUR HONOR.

7 JUDGE YOUNG: I DON'T DOUBT THAT IT'S BEEN DIFFI-  
8 CULT. AND SHE'S MADE SOME CHOICES IN THAT REGARD. I SUS-  
9 PECT THAT WHILE THEY MAY NOT BE MEASURED ECONOMICALLY THERE  
10 WOULD BE RELATIONSHIPS THAT COULD BE, THAT HAVE BEEN GEN-  
11 ERATED BETWEEN THE MOTHER AND THE CHILDREN THAT ARE PROBABLY  
12 VERY DIFFERENT THAN THE OPPORTUNITIES THAT HAVE BEEN PRE-  
13 SENTED TO THE FATHER BECAUSE OF THE FACT THAT THE MOTHER  
14 HAS LIVED WITH THE CHILDREN. AND THE CONFLICTS THAT THESE  
15 PARENTS HAVE HAD BETWEEN THEMSELVES--I WILL SAY THAT FROM  
16 EVERYTHING THAT I'VE BEEN ABLE TO OBSERVE IN RELATION TO  
17 THE ACCIDENT TO THE YOUNGEST CHILD, THAT THE REPORT BY MR.  
18 WELLS TO SOCIAL SERVICES AND OTHERS, TO ENGAGE THEM IN  
19 INVOLVEMENT IN THIS WAS COMPLETELY IRRESPONSIBLE AND SHOULD  
20 NOT HAVE OCCURRED. BUT WHO KNOWS WHAT WE EACH MIGHT DO  
21 IN THE EMOTION AND TRAGEDY OF OUR SON BEING HIT BY AN AUTO-  
22 MOBILE. SO I THINK THESE PARTIES HAVE SHOWN REMARKABLE  
23 IMMATURITY IN SOME OF THE THINGS THAT THEY HAVE DONE. AND  
24 I WILL TELL YOU THAT CANDIDLY, MR. WELLS, FACE TO FACE.  
25 I THINK THAT WAS IRRESPONSIBLE OF YOU. AND I THINK YOUR

1 APPROACH TO MS. LEDEZMA WAS IRRESPONSIBLE AND INAPPROPRIATE.  
2 I WOULD HOPE THAT IN THE FUTURE THOSE KINDS OF THINGS OUGHT  
3 NOT TO OCCUR.

4 BUT IN ANY EVENT, THE CIRCUMSTANCES OF THE FACT  
5 THAT SHE HAS BEEN UNABLE TO DEVELOP SENIORITY, THOSE CIRCUM-  
6 STANCES ARE NO DIFFERENT THAN AN AWFUL LOT OF OTHER PEOPLE.  
7 SHE NOW HAS THE OPPORTUNITY TO BE EMPLOYED AT \$30,000.00  
8 A YEAR, AND THAT'S MORE SUBSTANTIAL THAN PROBABLY 60 PERCENT  
9 OF OUR POPULATION, IF NOT MORE. AND THAT, TO ME, IS ADEQUATE  
10 INCOME TO MEET HER NEEDS.

11 SO, IS THERE ANYTHING ELSE YOU DESIRE FOR THE  
12 RECORD?

13 MR. HANKS: NO, YOUR HONOR, I THINK--

14 JUDGE YOUNG: ALL RIGHT. MR. GUYON, IF YOU WILL  
15 PREPARE THE ORDER CONSISTENT WITH THE RULING OF THE COURT  
16 AND PRESENT THEM TO MR. HANKS FOR APPROVAL AS TO FORM.  
17 COURT'S IN RECESS.

18 MR. HANKS: THANK YOU, YOUR HONOR.

19 MR. GUYON: THANK YOU, YOUR HONOR.

20 (WHEREUPON, THE TRIAL PROCEEDINGS WERE CONCLUDED).

21

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\* \* \*

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- (h) irreconcilable differences of the marriage;
- (i) incurable insanity; or
- (j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless: (i) the defendant has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and (ii) the court finds by the testimony of competent witnesses that the insanity of the defendant is incurable.

(b) The court shall appoint for the defendant a guardian ad litem, who shall protect the interests of the defendant. A copy of the summons and complaint shall be served on the defendant in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the defendant resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the defendant and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The plaintiff or defendant may, if the defendant resides in this state, upon notice, have the defendant brought into the court at trial, or have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant. For this purpose either party may have leave from the court to enter any asylum or institution where the defendant may be confined. The costs of court in this action shall be apportioned by the court. 1987

### **30-3-2. Right of husband to divorce.**

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband. 1953

### **30-3-3. Temporary alimony and suit money.**

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action. 1953

### **30-3-4. Pleadings — Findings — Decree — Sealing.**

(1) (a) The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause.

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a man-

datory course provided in Section 30-3-11.3 and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall make and file findings and decree upon the evidence.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1992

### **30-3-4.1 to 30-3-4.4. Repealed.**

1990

### **30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and

maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith. 1991

#### **30-3-5.1. Provision for income withholding in child support order.**

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 78, Chapter 45d. 1985

#### **30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.**

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4, Part 5. A final award of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9. 1992

#### **30-3-5.5. Petition to protect abused child — Jurisdiction under this chapter.**

(1) A person who has filed a complaint under this chapter may also file a petition with the district court for a protective order for the protection of any children residing with either party to the action under this chapter. The petition and procedures shall be the same as for the issuance of protective orders in the juvenile court under Sections 78-3a-20.5, 78-3a-20.6, 78-3a-20.7, 78-3a-20.8, 78-3a-20.9, and 78-3a-20.10. The court or the cohabitant may use the protections provided in this chapter and Title 78, Chapter 3a, Juvenile Courts, and when necessary, those protections under Title 76, Chapter 5, Offenses Against the Person, which provide for criminal prosecution.

(2) A person who has obtained a protective order pursuant to this section shall notify any other court in which another action is pending or order is issued

pertaining to the same family member named in the protective order. 1991

#### **30-3-6. Repealed.**

1985

#### **30-3-7. When decree becomes absolute.**

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program is administered and have completed attendance at the mandatory course provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of one of the parties, upon determination that course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties;

(b) at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending; or

(c) when the court, before the decree becomes absolute, for sufficient cause otherwise orders.

(2) The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree. 1992

#### **30-3-8. Remarriage — When unlawful.**

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmation of the decree. 1988

#### **30-3-9. Repealed.**

1989

#### **30-3-10. Custody of children in case of separation or divorce — Custody consideration.**

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate. 1988

#### **30-3-10.1. Joint legal custody defined.**

In this chapter, "joint legal custody":

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(2) may include an award of exclusive authority by the court to one parent to make specific decisions;



tating settlement of any or all issues in a domestic relations case. Issues which cannot be agreed upon by the parties at the settlement conference shall be certified to the district court for trial; and

(L) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

(3) **Duties of Court Commissioner.** Under the general supervision of the presiding judge, the court commissioner has the following duties prior to any domestic matter being heard by the district court:

(A) Review all pleadings in each case;

(B) Certify those cases directly to the district court that appear to require a hearing before the district court judge;

(C) Except in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court;

(D) Coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties; and

(E) Refer appropriate cases to mediation programs if available.

(4) **Objections.** With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court. Any party objecting to the recommended order, shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel. Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection.

(5) **Judicial review.** Cases not resolved at the settlement or pretrial conference shall be set for trial on all issues not resolved. All other matters shall be reviewed in accordance with Rule 4-501.

(6) **Prohibitions.**

(A) Commissioners shall not make final adjudications of domestic relations matters other than default or uncontested divorces and modifications.

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

(Amended effective January 15, 1990; April 15, 1991.)

#### **Rule 6-402. Repealed.**

#### **Rule 6-403. Shortening 90-day waiting period in domestic matters.**

##### **Intent:**

To establish a procedure for shortening or waiving the 90-day waiting period in domestic cases.

##### **Applicability:**

This rule shall apply to the district courts.

##### **Statement of the Rule:**

(1) Proceedings on the merits of a divorce action shall not be heard by the district courts unless 90 days have elapsed from the time the complaint was filed or unless the Court finds that there is good cause for shortening or eliminating the waiting period and

enters a formal order to that effect prior to the hearing date.

(2) Application for a hearing less than 90 days from the date the complaint was filed shall be made by motion and accompanied by an affidavit setting forth the factual matters constituting good cause. The motion and supporting affidavit(s) shall be served on the opposing party at least five days prior to the scheduled hearing unless the party is in default.

(3) In the event the Court finds that there is good cause for hearing in less than 90 days from the filing of the complaint, the facts constituting such cause shall be included in the findings of fact and presented to the Court for signature.

#### **Rule 6-404. Modification of divorce decrees.**

##### **Intent:**

To establish procedures for modification of existing divorce decrees.

##### **Applicability:**

This rule shall apply to all district courts.

##### **Statement of the Rule:**

(1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.

(2) The responding party shall serve the reply within twenty days after service of the petition. Either party may file a certificate of readiness for trial. Upon filing of the certificate, the matter shall be referred to the domestic relations commissioner prior to trial, or in those districts where there is not a domestic relations commissioner, placed on the trial calendar.

(3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge.

#### **Rule 6-405. Repealed.**

#### **Rule 6-406. Opening sealed adoption files.**

##### **Intent:**

To establish uniform procedures for opening sealed adoption files and providing identifying information to adoptees and/or birth parents.

##### **Applicability:**

This rule shall apply to all district and juvenile courts.

##### **Statement of the Rule:**

(1) All requests to open sealed adoption files to obtain identifying information of adoptee or birth parents shall be initiated by filing a formal petition with the clerk of the court in the county where the adoption was granted. The petition must set forth in detail the reasons the information is desired and must be accompanied by a filing fee of \$75.00. Neither a formal petition nor a filing fee is required to obtain certified copies of the decree.

(2) In cases where the petitioner is seeking specific medical information to aid in the preservation of the health of the petitioner, the petitioner must contact the Bureau of Vital Statistics and the adoption agency involved in the placement (if applicable) and make a request for all non-identifying information regarding the birth parents and other relatives. The petition must be accompanied by a letter from a licensed physician stating what the need is and